Supreme Court, U.S.
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No. 05-1608

In The
Supreme Court of the United States

RONALD LEE ABBOTT, *et al.*,

Petitioners,

v.

A-BEST PRODUCTS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Circuit Court Of Kanawha County, West Virginia

BRIEF OF RESPONDENT OLD ORCHARD INDUSTRIAL CORP., INDIVIDUALLY AND AS SUCCESSOR-IN-INTEREST TO VAPOR CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JON B. ORNDORFF
Counsel of Record
BAKER & LANCIANESE
1108 Third Avenue, Suite 300
Huntington, West Virginia 25701
(304) 522-6906

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether state common-law tort claims against manufacturers of locomotive equipment are preempted by the Boiler Inspection Act – enacted with congressional intent to occupy the entire field of locomotive regulation – when such claims relate to the design, construction, or material of locomotives or their parts.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Pursuant to Rule 29.6 of the Supreme Court Rules, Old Orchard Industrial Corp. states that it is a wholly owned subsidiary of Brunswick Corporation, a publicly traded entity.

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STATEMENT OF THE CASE

Respondent Old Orchard Industrial Corp., individually and as Successor-in-Interest to Vapor Corporation, states that the background information provided in the Petition for Writ of Certiorari is generally correct.

REASONS TO DENY THE PETITION

I. NO FINAL ORDER HAS BEEN ENTERED.

This Court should decline to address the issues involved herein because there are no final orders or judgments in these cases. The jurisdiction of this Court to review decisions of the highest courts of each state is primarily limited to the review of a "final judgment or decree." 28 U.S.C. § 1257. The exceptions to the final judgment limitation are "very few." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (outlining the four categories of exceptions to this Court's jurisdictional requirement of a final order). None of those exceptions apply to this case.

Petitioners' number well over 7000 individuals and have filed claims against approximately 40 defendants. At this time, counsel for this Respondent is unaware of the resolution of any of these civil actions. Regardless, Petitioners have failed to establish that a final order has been entered in any of these cases.

Even though the trial court's determination as to the claims asserted by the Petitioners against the Respondents is final, no final orders have been entered for the entirety of these cases. Although a number of the defendants have likely settled or been dismissed, no final order dismissing the case in its entirety has been entered. The reason is that a number of defendants not currently before this Court still have claims pending against them.

The appeal proceeded in the West Virginia court system because a final order is not a prerequisite of the West Virginia Supreme Court of Appeals. *Sisson v. Seneca Mental Health*, 404 S.E.2d 425, 427-28 (W.Va. 1991) (noting that the West Virginia court has a less restrictive interpretation of Rule 54(b)). Although the West Virginia Supreme Court could proceed with the appellate review, this Court should be reluctant to entertain the appeal at this time. What other potential reviewable issues may surface any of these seven thousand claims as to any of the numerous remaining defendants are unknown at this point. As this Court is well aware, the asbestos litigation presents numerous due process pitfalls, and could result in additional appeals for this Court's review.

The primary purpose of the final judgment requirement for this Court's review is to avoid piecemeal reviews of the case. *Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). If the Court rules on the issues presented in the Petition, remaining issues in these cases as to other defendants may result in a return of the cases to this Court. Until all of the claims against all of the defendants in the cases are resolved, this Court's requirement for the review of final orders has not been met. Thus, the denial of the writ is appropriate.

II. THE WEST VIRGINIA SUPREME COURT CORRECTLY APPLIED PREEMPTION ANALYSIS AND RELIED UPON PRIOR RULINGS OF THIS COURT.

Even if the Court determines that sufficient final orders have been entered with respect to the Respondents, the West Virginia Supreme Court correctly applied the federal law and the preemption analysis, which this Court has repeatedly outlined. This Court has already decided the federal questions involved in the West Virginia Supreme

Court's decision. The West Virginia Supreme Court relied upon and correctly applied this Court's holding in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), as to the scope of the preemptive field of the Locomotive Boiler Inspection Act (49 U.S.C. § 20701 *et seq.* ("BIA")).

Moreover, the issue of whether Congress intended the BIA to preempt state law claims has been addressed in on-point opinions by the courts of last resort of four states, inclusive of West Virginia, and at least four United States Courts of Appeals. The West Virginia Supreme Court's decision is wholly in agreement with every one of these appellate court decisions. All of these courts agree with the decision of the West Virginia Supreme Court, which Petitioners seek to appeal. Because all of the state courts of last resort and the United States Courts of Appeal have been unanimous in favor of preemption and because all of the federal questions raised by the Petitioners have previously been determined by this Court, the denial of the Petition for Writ of Certiorari is appropriate.

A. The West Virginia Supreme Court Correctly Applied the Federal Preemption Analysis Set Forth in Multiple Cases by this Court.

The United States Constitution provides that federal law "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2, quoted in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Federal law preempts state law where (1) the state law conflicts with federal law or compliance with both state and federal law is impossible; (2) Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law; (3) federal law expressly preempts the state law; or (4) state law stands as an obstacle to the accomplishment and execution of the full

objectives of Congress or interferes with the methods by which the federal statute was designed to reach Congress's goal. *Louisiana Pub. Serv. Comm'n v. Fed. Communications Comm'n*, 476 U.S. 355, 368-69 (1986); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992).

The Petitioners assert that the West Virginia Supreme Court failed to begin its analysis with a presumption against preemption. However, this Court has unequivocally held that there is no "'assumption' of non-pre-emption ... when the State regulates in an area where there has been a history of significant federal presence." *U.S. v. Locke*, 529 U.S. 89, 108 (2000) (national and international maritime commerce). In this case, as in *Locke*, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Id.*; *see also Carrillo*, 20 Cal. 4th 1158, 1163, 86 Cal. Rptr. 2d 832, 890 P.2d 386 (1999). Thus "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108.

B. As this Court Determined in *Napier*, through the BIA, the United States Congress has Enacted a Comprehensive Regulatory Scheme, Which Preempts the Entire Field of Locomotive Safety and Equipment.

This Court has already explicitly addressed the preemption power of the BIA in *Napier*, holding that the BIA occupies the entire field. The Court examined the scope of the BIA and found that the United States Congress had preempted the entire field of locomotive safety and equipment, which encompasses all state law within the scope of authority delegated to the Secretary of Transportation

including the design, construction and materials of locomotives and their parts. *Napier*, 272 U.S. at 611-13.

It has been settled for almost 80 years, since this Court's decision in *Napier*, that the preemptive scope of the BIA precludes all state law respecting locomotives and locomotive parts, material or equipment used in interstate commerce. *Napier* held that Congress intended the BIA "to occupy the field" in respect of all areas subject to the BIA and that the BIA accordingly preempted all state law within the BIA's grant of authority to the Interstate Commerce Commission. 272 U.S. at 613. Those areas include "the design, the construction, and the material of every part of the locomotive" – the "'entire locomotive . . . and all parts and appurtenances thereof.'" *Id.* at 611, 608.

State law concerning "the design, the construction, or the material" of any part or appurtenance of the locomotive is thus preempted because it is within the Commission's authority – whether or not the state law conflicts with the federal rule, and whether or not there is any applicable federal rule at all (*Napier*, 272 U.S. at 613 (emphases added)):

> *It is also urged that, even if the Commission has power to prescribe* an automatic firebox door and a cab curtain, *it has not done so, and that it has made no other requirement inconsistent with the state legislation. This, . . . if true, is without legal significance.* The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.

Napier remains the law of the land.[1] The locomotive parts that Petitioners attempted to claim were defective in the action below fall squarely "within the scope" of FRA's authority, and thus, within the preempted field. *Napier*, 272 U.S. at 611. The following appellate holdings agree that *Napier* still controls: *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458 (2nd Cir. 1999), *cert. denied sub nom., Oglesby v. General Motors Corp.*, 528 U.S. 1004 (1999); *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 912 (1983); *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987); *United Transp. Union v. Foster*, 205 F.3d 851, 860-61 (5th Cir. 2000); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998); *First Security Bank v. Union Pacific R. Co.*, 152 F.3d 877 (8th Cir. 1998); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983); *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *King v. Southern Pacific Transp. Co.*, 855 F.2d 1485, 1489 n.2 (10th Cir. 1988); *Norfolk Southern Ry. Co. v. Denson*, 774 So. 2d 549, 553-55 (Ala. 2000); *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471, 93 Cal. Rptr. 2d 342, 993 P.2d 996, *cert. denied*, 531 U.S. 958 (2000); *Central of Georgia R. Co. v. Markert*, 200 Ga. App. 851, 410 S.E.2d 437, *cert. denied*, 200 Ga. App. 895 (1991); *Key v. Norfolk Southern Ry. Co.*, 228 Ga. App. 305, 491 S.E.2d 511 (1997); *In re Train Collision at Gary, Indiana*,

[1] Indeed, in 1983, this Court summarily affirmed a decision that "locomotive equipment" is "an area totally preempted by" the BIA. *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983). The Supreme Court's summary affirmance is a binding precedent. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

670 N.E.2d 902 (Ind. App. 1996), *appeal denied sub nom., Dillon v. Chicago Southshore & South Bend R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom., Dillon v. Northern Indiana Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Furlough v. Union Pacific R. Co.*, 766 So. 2d 751, 761-62 (La. App. 2000), *writ denied*, 781 So. 2d 556 (2001); *Kilgore v. General Motors Corporation*, 853 So.2d 171 (Ala. 2002); *Darby v. A-Best Products, Inc.*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005).

As this Court explicitly stated in *Napier*, 272 U.S. at 611:

> The BIA provides exclusive federal authority to regulate the design, construction and material of every part of the locomotive and tender as well as all appurtenances. . . . The BIA preempts any state law that regulates locomotive equipment because the BIA was enacted with the congressional intent to occupy the field of locomotive equipment.

Railroads have been "subject to comprehensive federal regulation for nearly a century." *Carrillo*, 20 Cal. 4th at 1163, (quoting *United Transp. Union v. Long Island R. Co.*, 455 U.S. 678, 687 (1982)). Congress "inten[ds] that railroads should be regulated primarily on a national level through an integrated network of federal law," and has regulated "almost all aspects of the railroad industry, including rates, safety, labor relations, and worker conditions." *R.J. Corman R. Co. v. Palmore*, 999 F.2d 149, 152 (6th Cir. 1993).

The federal government has specifically regulated the design, maintenance, and safety of locomotives for over a hundred years. In 1893, Congress enacted the first of the Safety Appliance Acts ("SAA"), and in 1911 it followed with the BIA, now known as the Locomotive Inspection Act. The SAA and BIA – enacted with the same Congressional purposes, *Urie v. Thompson*, 337 U.S. 163, 190 (1949) –

are now codified, respectively, at 49 U.S.C. §§ 20301-20306 and 20701-20903 (1994).

The BIA grants federal regulators authority over "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611-13. The BIA requires locomotives to be "safe to operate without unreasonable danger of personal injury," 49 U.S.C. § 20701, and to that end vests in the Secretary of Transportation, rule-making power adequate to protect employees against disease as well as against accidents, and "the power to make rules for employee health has been exercised." *Urie*, 337 U.S. at 193 (BIA covered employee injury from long-term inhalation of sand dust on locomotive).

The Federal Railroad Administration ("FRA") regulates railroads under delegation of authority from the Secretary of Transportation. The FRA has exercised its authority to regulate the design, construction and material of the locomotive and all of its parts, including, for example, cab seats, wheel brakes, hand brakes, couplers, handholds, sill steps, running boards, and ladders, *see* 49 C.F.R. Part 229 (locomotive safety standards), and specifically motors (49 C.F.R. §§ 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. §§ 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab (49 C.F.R. §§ 229.115-135).

The BIA mandates not only the design, construction and material, but also the inspection, testing and maintenance of locomotives. 49 U.S.C. § 20701; *see generally*, 49 U.S.C. §§ 20701-20903. Regulations under the BIA require daily inspections (49 C.F.R. § 229.21); thorough inspection and testing of gauges, electrical devices, insulation, steam generators, and other components every three months (49

C.F.R. § 229.23-25 and Form FRA F180-49A); and further tests annually and biennially (49 C.F.R. § 229.27-31).[2]

The locomotive parts Petitioners claim are defective fall squarely within the federal authority over "every part" of the locomotive. This Respondent's steam generators are specifically regulated, 49 C.F.R. §§ 229.103-113. Further, insulation must be inspected and kept in good condition, and must be present when the federal regulations require it. *See* 49 C.F.R. §§ 229.25(b) (requiring periodic inspection of "visible insulation"), 229.89 (prohibiting "[b]roken or badly chafed insulation" on certain connections), 229.41 (exposed pipes carrying hot gases or high voltage must be "equipped with guards to prevent personal injury"), and 229.83 (certain parts that may become electrically charged must be insulated).[3]

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[2] Under these regulations, for example, brake components must be "cleaned, repaired or replaced," a steam-generator component must be "removed and inspected," the main reservoir must be "hammer tested over its entire surface," "all internal and external surfaces" must be inspected at specified intervals, and a periodic inspection must be performed annually. 49 C.F.R. §§ 229.27, 229.31; *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 486-87 (1943) (approving rules under the BIA requiring water tanks to "be maintained free from leaks," "inspected" and "cleaned, if necessary" at least once a month, and cab aprons to be "maintained in a safe and suitable condition").

The BIA has regulated inspection and maintenance since at least the 1930s. For example, when steam boilers were in common use, BIA regulations required periodic removal, partial disassembly, cleaning, inspection for cracks and other damage inside and out, and testing of the boilers. *See, e.g.*, 49 C.F.R. §§ 91.10-11, 91.16, 91.18, 91.304-05 (1939). BIA regulations expressly held railroads responsible for "repair" and maintenance of locomotives. 49 C.F.R. §§ 91.12, 91.20, 91.200 (1939).

[3] Federal regulation of locomotive insulation extends back before the Petitioners would have begun working on or around locomotives. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation ... shall be made and all

(Continued on following page)

As further evidence that asbestos on locomotives falls within the purview of the federal government, Congress enacted the Rail Safety Enforcement and Review Act of 1992, Public Law 102-365, 106 Stat. 972, on September 3, 1992. Section 10 of that Act amended § 202 of the Federal Railroad Safety Act of 1970 (45 U.S.C. § 431) ("FRSA"), as amended by the 1992 Act, by adding at the end of § 202 a new subsection (t) requiring the Secretary of Transportation to assess "the extent to which environmental ... conditions in locomotive cabs affect ... health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The 1992 Act required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations."

Pursuant to this mandate, in September 1996, the FRA issued a Report to Congress addressing whether asbestos was a possible factor affecting locomotive cab safety and working conditions. It expressly found that asbestos on locomotives posed no health problem and that further regulation of asbestos was unwarranted. FRA Report to Congress, *Locomotive Crashworthiness and Cab Working Conditions* at 10-1, 10-12, 12-9 (1996).

The BIA is, in sum, comprehensive, and "was intended to occupy the field." *Napier*, 272 U.S at 611-13. The BIA's field includes "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," indeed any matter within federal regulators' authority under the BIA. *Napier*, 272 U.S. at 611-13. In addition, the BIA's field preemption is integral

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defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

to Congress's scheme of promoting interstate commerce. Congress intended to ensure trains are subject to "one set of equipment regulation," so that the rules do not change when the trains cross state lines:

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances ... through interstate commerce. The virtue of uniform national regulation is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."

Law v. General Motor Corp., 114 F.3d at 910 (quoting *Southern Pacific Transp. Co. v. Pub. Util. Comm'n of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993)). Train regulation is "peculiarly [a subject] that cries for uniform law." *Carrillo*, 20 Cal. 4th at 1169. Otherwise, permitting state standards would require cars and locomotives to change "as they cross state lines, or adhere to the standard set by the most stringent state," and would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, provides a uniform federal system of compensation for on-the-job injuries – "a mechanism that doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. In a FELA action, the BIA "imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401, 56 S. Ct. 504, 80 L. Ed. 740 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law" under FELA. *Urie*, 337 U.S. at 189. Congress intended the BIA, SAA and FELA to be considered together, *Urie*, 337 U.S. at

180, and preemption applies with special force to railroad workers' injuries (*Law*, 114 F.3d at 910):

> It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. §§ 20101-20144 (1994). The FRSA is not limited to locomotives and authorizes the Secretary of Transportation to issue supplemental regulations in the area of railroad safety generally. The FRSA contains express preemption and savings clauses that severely restrict the power of states to regulate in respect of any aspect of railroad safety. 49 U.S.C. § 20106. The FRSA also explicitly underscores the importance of uniform laws relating to railroad safety: "[l]aws, regulations, and orders related to railroad safety shall be *nationally uniform* to the extent practicable." 49 U.S.C. § 20106 (emphasis added). Significantly, the FRSA purposely left the BIA "intact, including its preemptive effect." *Marshall v. Burlington Northern*, 720 F.2d at 1152-53; *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998). Thus, the BIA's preemptive scope remains intact, just as it did almost 80 years ago when this Court ruled in *Napier*.

C. The BIA Precludes All State Regulation, Including State Law Tort Claims.

Petitioners argue that state law is not preempted unless it conflicts with, frustrates, or directly and substantially affects a federal law. However, Congress's relevant "intent" in occupying the field is "to exclude state regulation" from the field, so any state law in the field necessarily "conflicts with" that intent and is preempted. *English v.*

General Electric Co., 496 U.S. 72, 79-80 n.5 (1990). "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), and "[t]he States must leave all regulatory activity in [the occupied field] to the Federal Government." *Michigan Carriers and Freezers Ass'n v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984).

Further, *Napier* and a long line of other cases reject the Petitioners' argument. This Court in *Napier* stated that a conflict or substantial effect on a federally regulated matter is irrelevant to field preemption. *Napier* found that state laws were preempted even if they promoted the same purpose as the federal act, *i.e.*, safety. 272 U.S. at 610-11, 613. Whether state law is "inconsistent with" federal requirements is "without legal significance"; so is whether the Commission "has not seen fit to exercise its authority" on the matter at all. *Id.* at 613. Consequently, a state law's having only an "incidental" effect on commerce does not save it. *Id.* at 611.

Every appellate court to address the issue agrees. "[A]ny state law that attempts to regulate within the domain is preempted," and the "relevant question" for preemption under the BIA "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place." *Oglesby*, 180 F.3d at 461; *Springston*, 130 F.3d 241; *Law*, 114 F.3d 908; *First Security Bank*, 152 F.3d at 880-81. Congressional occupation of the field "leaves no place for state common law actions," (1) whether "consistent, complementary, additional, or otherwise" to federal law and (2) although no federal regulation directly speaks to the issue. *Carrillo*, 20 Cal. 4th at 1168 (citation omitted).

The Petitioners misstate field preemption analysis. There is no requirement to show particular actions preempted. *All* law in the field is preempted. In *Napier*, the Court did not inquire whether Congress had specifically considered curtains and fire doors; state law respecting them was preempted because the requirements were within the "broad scope of the authority conferred upon the Commission." 272 U.S. at 611. In *Oglesby*, *Springston*, *First Security* and *Law*, the Second, Sixth, Eighth and Ninth Circuits respectively found state-law claims preempted regardless of whether Congress (or the FRA) considered the "particular" equipment or claims there at issue, or even tort claims generally. Because the BIA occupies the field, tort claims within the field are preempted *absent evidence Congress intended to preserve them*. *Carrillo*, 20 Cal. 4th at 1168-69.

Petitioners' claims here fall squarely within the field. Petitioners allege that the Respondents' products were defective because their parts included asbestos materials. The West Virginia Supreme Court correctly determined that the claims are therefore preempted because they directly attack the "design," "construction" and "material" of "part[s] of the locomotive." *Napier*, 272 U.S. at 611.

Regulation of all locomotive parts and materials is within the "broad scope of the authority conferred upon the [Secretary]." *Napier*, 272 U.S. at 611-13; *Law*, 114 F.3d at 911; *Oglesby*, 180 F.3d at 461. So, in particular, is the protection of employees against inhalation of hazardous substances. *Urie v. Thompson*, 337 U.S. at 193 (silicosis from inhalation of locomotive sanders). Indeed, the Secretary already regulates insulation under the authority of the BIA, specifically considered regulating asbestos, and found further regulation of it unwarranted.

Field preemption "by definition means congressional intent generally extends beyond the express terms of the

statute and regulations to all aspects coming within their contemplation," including common-law claims. *Carrillo*, 20 Cal. 4th at 1168;[4] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868-870; *Cipollone*, 505 U.S. at 521-23. That rule is squarely applicable to the BIA. *Oglesby*, 180 F.3d at 460-61, 462 (BIA preempts common-law defect and failure-to-warn claims concerning an engineer's seat); *Law*, 114 F.3d at 910-11 (BIA preempts common-law design defect and failure-to-warn claims concerning insulation, engines and brakes); *Springston*, 130 F.3d at 244-45 (BIA preempts common-law negligence and strict liability design defect claims for failure to install better warning devices on locomotive); *Marshall v. Burlington Northern*, 720 F.2d at 1152; *Eldridge v. Missouri Pacific R.*, 832 F. Supp. 328 (E.D. Okla. 1993); *Key v. Norfolk Southern Railway Co.*, 491 S.E.2d 511; *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902; *Central of Ga. R. Co. v. Markert*, 410 S.E.2d at 438 (similar); *cf. CSX Transp., Inc. v. Easterwood*, 507 U.S. 658-675 (1993). (FRSA preempts common-law claims); *Ouellette v. Union Tank Car Co.*, 902 F. Supp. 5, 10 (D. Mass. 1995) (same); *Capozzi v. Blanchette*, 433 F. Supp. 704, 705 (W.D. N.Y. 1977) (FRSA preempts common-law design defect claim).

D. State Tort Claims against Locomotive and Locomotive Part Manufacturers are Preempted.

The Petitioners assert that the preemptive scope of the BIA does not apply to manufacturers. (Pet. at 8-15). However, every federal court of appeals and every state supreme court to consider the issue agrees that the BIA preempts state tort claims against manufacturers. The Second Circuit

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[4] Petitioners rely on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238. It changes nothing. *Scheiding*, 22 Cal. 4th at 480 ("unlike the situation in *Silkwood*, the field occupied by the BIA must necessarily extend to state law tort recovery").

so held in *Oglesby*, 180 F.3d 458, as did the California's Supreme Court in *Scheiding*, 22 Cal. 4th 471, the Alabama Supreme Court in *Kilgore v. General Motors Corporation*, 853 So.2d 171, and the Ohio Supreme Court in *Darby*. The Ninth and Sixth Circuits have likewise so held. As the Ninth Circuit stated in *Law*, the "distinction [between manufacturers and railroads] . . . is without significance" because "[i]mposing tort liability on railroad equipment manufacturers" would force them to conform to state standards, thereby "transfer[ring] the regulatory locus from the Secretary of Transportation to the state courts – a result the BIA was clearly intended to foreclose." 114 F.3d at 911-12. *Accord*, *Springston*, 130 F.3d at 244-45 (defect claim against manufacturer preempted); *In re Train Collision at Gary, Indiana*, 670 N.E.2d 902 (same).

Preemption depends on whether a claim is within the preempted field, not on who the defendant is. *Taylor AG Ind. v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995) ("Under *Cipollone*, the analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement. . . ."). Thus, it is *what* is regulated, not *who* is regulated, that matters. What is regulated here is "the design, the construction, and the material" of locomotive "part[s]" and "appurtenances." *Napier*, 272 U.S. at 611. Since Petitioners' claims fall within the field, they are preempted. *Accord*, *Law*, 114 F.3d at 911-12.

The BIA covers manufacturers. Any "manufacturer . . . of railroad equipment" who violates or causes the violation of "any requirement of . . . the Locomotive Inspection Act" is subject to penalties. 49 C.F.R. §§ 229.7(b), 230.0. Accordingly, if a locomotive manufacturer violates applicable provisions of the BIA or FRSA or their regulations, its conduct is clearly within the enforcement reach of the Secretary of Transportation, and it would be subject to substantial civil penalties under § 21302. Further, the Secretary of Transportation has the exclusive discretion to

determine who is subject to its regulations and to enforce them accordingly. *Id.*

Even if the penalty provisions were not directly applicable to manufacturers, the "realities of the business world" are that "[b]ecause railroad operators are liable for any injuries suffered by their employees, they would not buy locomotives, cars and other equipment that fall short of the BIA standards." Doing so not only would risk FELA damage awards, but would subject railroad operators to daily fines of up to $20,000 for every violation. Thus, "[l]ocomotive manufacturers already have every incentive to comply with federal standards." *Law*, 114 F.3d at 912.[5]

Moreover, because the preemptive field, namely, the "design, the construction, and the material of every part of the locomotive" is "in the hands of a manufacturer," Congress's intent to preempt that field "would be accomplished best by including the manufacturer within the statute's coverage." *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 911-12. Finally, it would make no sense, and defeat Congress's purpose, if claims respecting locomotive parts were preempted as to the railroad that buys them but not as to the manufacturer that sells them. Congress intended that "railroads should be regulated primarily on a national level through an integrated network of federal law." *R.J. Corman R. Co. v. Palmore*, 999 F.2d at 152. The "uniform national regulation" of locomotive equipment is a centerpiece of Congress's plan, and is designed to avoid subjecting locomotives to non-uniform standards from one state to the next. *Law*, 114 F.3d at 910.

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[5] *Cf. Asahi Metal Indust. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (subjecting supplier of tire components to state court jurisdiction would "undoubtedly create[ ] an additional deterrent to the manufacture of unsafe components" but is unnecessary because "similar pressures will be placed on [the supplier] by [its] purchasers . . . ").

As the Ninth Circuit explained in *Law*, "[a]part from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state . . . " *Id.* at 910-11. The goal of the BIA is to prevent the paralyzing effect on railroads from patchwork requirements by each state concerning safety devices on locomotives crossing state lines. To facilitate this goal, the BIA applies to manufacturers of locomotives and their component parts as well as to railroad carriers. Petitioners' state tort claims concern the design, construction, and material of the locomotive, its parts and appurtenances, and those claims are preempted.

III. THE WEST VIRGINIA DECISION DOES NOT CONFLICT WITH ANY DECISION FROM ANOTHER STATE COURT OF LAST RESORT OR UNITED STATES COURT OF APPEALS.

A. *ADKINS V. ILLINOIS CENTRAL R.R.*:

Petitioners attempt to assert that one United States Court of Appeals decision, *Adkins v. Illinois Central R.R.*, 326 F.3d 828 (7th Cir. 2003), opposes the avalanche of cases finding preemption. However, the Seventh Circuit was presented in Adkins solely with the question of whether a district court's determination that subject matter jurisdiction was lacking could be subject to appellate review. *Id.* at 829. The Seventh Circuit followed numerous prior decisions in determining that the district court's order was not subject to review. Not surprisingly, the District Court had previously dismissed the claims against the locomotive manufacturer based on BIA preemption and determined that since the locomotive manufacturer was no longer in the case, BIA preemption no longer applied, and the court lacked subject matter jurisdiction. *Id.* at 830. No locomotive or locomotive part manufacturer remained in the case when

the appeal was sought to the Seventh Circuit. Further, the issue involved complete preemption, not field preemption. *Id.* Thus, the limited holding in *Adkins* does not oppose the avalanche of adverse authority from other jurisdictions, either state or federal.

B. *ENGVALL V. SOO LINE R.R. CO.*:

Petitioners argue that the West Virginia decision conflicts with the case of *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001). In *Engvall*, the Minnesota Supreme Court was confronted with the issue of whether a state common law cause of action for negligence *per se* for the violation of the Boiler Inspection Act could be maintained by a common carrier against a locomotive manufacturer. Although the *Engvall* court created such a cause of action in Minnesota, no other court has agreed. *Roth v. I&M Rail Link, L.L.C.*, 179 F. Supp.2d 1054 (S. D. Iowa 2001); *Union Pac. R.R. v. Motive Equip.*, 714 N.W.2d 232 (Wis. App. 2006); *Bonner v. Union Pacific R. Co.*, 2005 WL 1593635 (D. Idaho 2005).

More importantly, the cause of action presented to the Minnesota Supreme Court in *Engvall* has not been asserted in this action. None of the West Virginia courts have addressed the issue. Consequently, justiciability is lacking because the issue is not ripe for this Court's review.

Justiciability concerns the standing of litigants to assert particular claims and the appropriate timing of judicial intervention. *Renne v. Geary*, 501 U.S. 312, 320 (1991). Proper resolution of justiciability issues "requires examination of the pleadings and record to determine the nature of the dispute and the interests of the parties in having it resolved in this judicial proceeding." *Id.* at 315. Factors that the Court should consider in determining whether an issue is ripe are hardship to its denial, *Poe v. Ullman*, 367 U.S. 497 (1961), and the availability of an

adequate factual record. *California Bankers Association v. Schultz*, 416 U.S. 21 (1974).

Here, such a cause of action was not asserted in any of the Complaints or Amended Complaints below. At no time have the Petitioners moved to amend their complaints to include such a claim. Consequently, Petitioners will not endure any hardship because they have not even asserted the cause of action addressed in *Engvall*. Moreover, there are no facts or decisions from the trial court or West Virginia Supreme Court addressing such a cause of action. Therefore, whether the cause of action asserted in *Engvall* can be maintained, should not be reviewed by this Court.

IV. BIA PREEMPTION APPLIES REGARDLESS OF WHETHER A LOCOMOTIVE IS ON OR OFF LINE.

Petitioners' attempt to assert the "in use" or "off-line" exception to the BIA is misplaced. The requirements of the BIA are still applicable whether the locomotive is "on-line" or "off-line." The purpose of the "in use" exception to the strict liability standard is to allow a railroad the opportunity to bring a locomotive into its repair shop to repair the item which violates the BIA. The "off-line" exception in no way limits the scope of Congress's broad preemption of the entire field of locomotive parts and appurtenances.

None of the cases cited by Petitioners have anything to do with preemption, products liability, or even locomotive design. All involve FELA suits against railroads alleging that the railroad failed to discharge its absolute BIA duty to maintain locomotives and parts by, *e.g.*, permitting ice or grease buildup on a locomotive while it is off-line; these cases simply hold that the railroad's absolute duty to maintain applies to the locomotive's operation on-line but not when the locomotive is in repair or at rest off-line, for the very good reason that a locomotive while off-line (perhaps for months)

need not be in condition to operate on-line. The absolute duty to maintain has nothing whatsoever to do with preemption; the BIA preempts state law where the absolute duty to maintain does not apply at all, on-line or off. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (railroad owes no duty to maintain experimental devices, but state regulation of them is preempted). The "off-line" exception only abrogates the strict liability standard imposed on railroads for any violations of the BIA, which cause injury to a railroad employee.

Petitioners' assertion that states may regulate the design of locomotive parts off-line would require railroads to meet conflicting state standards off- and on-line; or – assuming no conflict – either to meet the most stringent state regulation on- and off-line or not to repair locomotives needing repair in states whose most stringent off-line regulations the locomotive does not meet. Requiring locomotives to "adhere to the standard set by the most stringent state" would undermine "Congress's goal of uniform federal railroad regulation." *Carrillo*, 20 Cal. 4th at 1169. Deterring railroads from repairing locomotives in any state would make no sense at all, indeed would flatly violate Congress's mandate that locomotives be maintained and promptly repaired wherever they go. That would stand as an obstacle to the "accomplishment and execution of the full purposes and objectives of Congress," and would be preempted on that ground as well. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 491-92 (1987).

V. NOTHING HAS CHANGED SINCE THIS COURT DECLINED TO REVISIT THE PREEMPTIVE SCOPE OF THE BIA ON FIVE OCCASIONS IN THE LAST TEN YEARS.

By denying certiorari in *Dillon* (1997), *Springston* (1998), *Oglesby* (1999), *Scheiding* (2000), and *Darby*

(2005), this Court has rejected the opportunity to revisit the scope of the BIA five times in the last ten years. Undoubtedly, the Court has exercised its "judicial discretion" to deny such review precisely because federal law in this area was settled long ago by *Napier* and no federal court of appeals or state court of last resort has made a conflicting decision. *See* Sup. Ct. Rule 10, "Considerations Governing Review on Certiorari." The West Virginia Supreme Court's decision was exactly the same as the decision appealed from the California Supreme Court in *Schieding* and the Ohio Supreme Court in *Darby*.

Nothing has changed since this Court denied the petitions for writ of certiorari in each of those four cases. Instead, as is discussed in more detail below, an even greater litany of cases has now agreed that Petitioners claims fall within the field preempted by the BIA. Accordingly, as the Court in *Napier* found almost 80 years ago, the BIA preempts the entire field of locomotive safety and equipment, including the design, construction and materials of the locomotive, its parts and appurtenances.

VI. THE WEST VIRGINIA SUPREME COURT'S DECISION IS IN AGREEMENT WITH EVERY OTHER APPELLATE COURTS ADDRESSING THE SAME ISSUES.

The trial court's and West Virginia Supreme Court's determinati[illegible] is entirely consistent with every other appellate court addressing BIA preemption of state law tort claims. The case law is unanimous in finding state law tort claims involving locomotive equipment are preempted by the BIA.

Three other state courts of last resort have specifically ruled on the issues raised by the Petitioners: the California Supreme Court in *Scheiding*, the Alabama Supreme Court in *Kilgore*, and the Ohio Supreme Court of Appeals in *Darby*.

All three agree with the West Virginia courts, and all three involved substantially identical facts as those at issue herein. In addition, the United States Courts of Appeals for the Second, Sixth, Eighth, and Ninth Circuits, *Oglesby*, *Springston*, *First Security*, and *Law*, respectively, have all reached the same conclusion as the West Virginia courts.

Scheiding v. General Motors Corp.: The California Supreme Court in *Scheiding v. General Motors Corp.*, *supra*, held that the BIA preempts asbestos claims against the manufacturers of locomotives. The court reviewed the history of BIA preemption and concluded that "*Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action against locomotive manufacturers for defective design of their product." The court ruled that all state causes of actions against locomotive manufacturers for asbestos exposure are preempted by the federal BIA. Reiterating the rationale from *Napier*, the court explained that the broad preemptive sweep is necessary to ensure uniform national regulation and avoid the need to remove or add equipment between states. *Scheiding*, 93 Cal. Rptr.2d at 345.

The court noted that in addition to compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. *Id.* at 345. If each state were to establish different liability-triggering standards, manufacturers would be forced to sell locomotives whose equipment could be changed as the locomotive crossed each state line. Obviously, Congress's goal of uniform regulations would be undermined. *Id.*

The *Scheiding* court emphasized that imposing tort liability on locomotive manufacturers clearly would affect the design, the construction, and the material of locomotives. The imposition of tort liability on railroad equipment manufacturers would force them to conform to

design and construction standards imposed by the states, transferring the locus from the Secretary of Transportation to state courts and thereby constraining the Secretary's regulatory authority and undermining the goal of uniformity. *Id.* at 348.

The *Scheiding* court also addressed the absence of any specific regulation of asbestos by the Secretary of Transportation. The court found that although there are no regulations regarding asbestos, such a regulatory scheme is entirely within the purview and the prerogative of the Secretary of Transportation. The court further stated that warning requirements are also within the scope of the Secretary's authority because the subject matter of any such labels would fall under the BIA. Accordingly, the California Supreme Court held that all claims of asbestos exposure to asbestos on locomotives are preempted by the Boiler Inspection Act.

***Kilgore v. General Motors Corporation*:** The Alabama Supreme Court also found preemption under the BIA in *Kilgore v. General Motors Corporation, supra*. The plaintiffs asserted state law product defect and failure to warn claims against General Motors for their father's alleged exposure to asbestos from locomotives during his work for the railroad. The Alabama Supreme Court found that the trial court improperly denied GM's motion for summary judgment because the claims were preempted by the BIA. The court acknowledged *Napier* as the seminal case establishing the BIA's preemptive effect and agreed that the preemptive scope of the BIA included state law causes of action.

The court specifically addressed the Petitioners' assertion herein that the federal statute should be narrowly construed and that state tort law actions will not be preempted unless they specifically conflict with the federal statute. *Id.* at 177-78. Noting that this Court has already

determined that the BIA occupies the entire field of locomotive equipment, he Alabama Supreme Court found that "narrowness is n an issue; the [BIA] preempts the entire field." *Id.* The urt also dismissed the argument that there is a presu ption against preemption by explaining that an "ass nption of non-pre-emption [sic] is not triggered when th State regulates in an area where there has been a histo of significant federal presence" as is the case with the ilroad industry. *Id.* at 178 (*citing Locke*, 529 U.S. 89).

The court noted hat the BIA does not explicitly regulate asbestos and xplained that "Congress intended for the BIA to occup the field; thus, the Secretary of Transportation has th discretion to regulate those areas he or she so chooses." *I* at 178-79. The Alabama Supreme Court agreed with th arguments made by the Respondents herein that the FRA has addressed asbestos and determined that no egulations are required. Consequently, the use of bestos on locomotives is clearly within the preempted eld.

Darby v. A-Best roducts, Inc.: The Ohio Supreme Court also tackled the identical issues raised herein and, likewise, found that he BIA preempts "state tort law claims against the m ufacturers of railroad locomotives asserting injury cause by exposure to asbestos contained in railroad locomotiv ." *Darby*, 811 N.E.2d at 1125-26. The plaintiffs alleged at the railroad and manufacturers had caused them to be exposed to asbestos, which resulted in their alleged injuri s. *Id.* at 1119. The court noted the trial and appellate d isions, which have all found state law claims against ra oad manufacturers are preempted by the BIA, and exp ssly cited to and incorporated the West Virginia Suprem Court's decision in its ruling. *Id.* at 1125.

Consequently, all of the state courts of last resort, which have addressed the issues presented herein, have agreed with the trial court's and West Virginia Supreme Court's decision below.

***Law v. General Motors Corp.*:** On three occasions, the Ninth Circuit has held that state common law tort claims against locomotive equipment manufacturers are preempted by the BIA. *See Law*, 114 F.3d at 913; *accord Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempted state common law tort claims of a non-railroad employee injured by locomotive crane); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (common law negligence action against railroad manufacturers alleging inadequate warning devices on a locomotive are preempted by the BIA). In *Law*, railroad employees brought various state common law tort actions for hearing loss against the manufacturers of locomotive engines and brakes. *Law*, 114 F.3d at 909.

In affirming the district court's dismissal based on BIA preemption, the Ninth Circuit noted that "[i]t has long been settled that *Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment.*" *Id.* at 910 (emphasis added). The court also recognized that the purpose of tort liability is an effort to persuade defendants to follow a standard of care that is established by the state common law, and the court rejected plaintiffs' argument that the field occupied by the BIA did not apply to state tort claims directed against manufacturers. *Id.* at 911.

The Ninth Circuit also rejected the plaintiffs' argument that injured railroad workers would be left without a remedy, finding Congress intended the FELA to be an exclusive remedy. *Id.* at 912. The court reasoned that placing the potential of liability for injuries to railroad

workers solely upon the railroad employers would result in the railroads purchasing only from manufacturers whose products comply with the BIA. *Id.* The court concluded that, due to the fact that the railroads would demand BIA compliant products, the manufacturers had a strong incentive to comply with the BIA and that the preemption of state common law tort claims did not compromise the safety of railroad workers. *Id.*

The Ninth Circuit relied on the language of the BIA and this Court's language in *Napier*, noting that the federal government has "established a comprehensive, national regime of locomotive regulation. This regime – enforced by FELA and the threat of heavy civil penalties – preempts every state effort to establish independent standards for the design, construction and material of locomotives." *Id.* Because this field is broad enough to encompass design defect claims against locomotive equipment manufacturers, the Ninth Circuit held the claims were preempted.

***Oglesby v. Delaware & Hudson Ry. Co.*:** The Second Circuit likewise found that the BIA preempts state tort claims. *See Oglesby v. Delaware & Hudson Railway Co.*, 180 F.3d 458 (2nd Cir. 1999). In *Oglesby*, a railroad employee brought a FELA action against his employer and a state common law tort claim against a locomotive manufacturer, claiming he was injured adjusting a cab seat. *Id.* at 460. The district court denied the manufacturer's motion for summary judgment, finding no preemption. *Id.*

The Second Circuit disagreed. The court explained that the field occupied by the BIA includes manufacturers as well as railroads because the scope of the BIA extends to "both the 'design' and 'construction' of a locomotive's parts." *Id.* (citing *Napier*, 272 U.S. at 611). According to the court, the intent of Congress would be best accomplished by including manufacturers in the scope of the BIA

because the design and construction of locomotive parts are left in the hands of the manufacturer. *Id.* The Second Circuit rejected the plaintiff's argument that the BIA only preempts legislation and regulations but not state common law tort causes of action because the preemption of state common law tort claims is necessary to maintain the "uniformity of the BIA." *Id.* The court noted that "an award of damages can act as a 'potent method of governing conduct and controlling policy.'" *Id.* (quoting *San Diego Bldg. Trades Council Millman's Union v. Garmon*, 359 U.S. 236, 247 (1959)). Because tort damages can force compliance with a state imposed standard, whether the source of damages comes from a statute or a common law remedy has no relevance. Both sources of regulation force railroad manufacturers to comply with a standard of care established by the state. *Id.*

First Security Bank v. Union Pacific R.R.: The Eighth Circuit has held that state tort claims against railroad manufacturers are preempted. *See First Security Bank v. Union Pacific Railroad*, 152 F.3d 877 (8th Cir. 1998). In *First Security Bank*, the plaintiff was the administrator of the estate of a woman who was killed when her car was struck by a train at a railroad crossing. *Id.* at 878-879. The plaintiff claimed, in part, that the horn employed on the train that struck the plaintiff's decedent was inadequate to warn a person in a car of her make and model. *Id.* at 880. The district court dismissed the plaintiff's state common law tort claim on the basis of field preemption under the BIA. *Id.*

According to the Eighth Circuit, if each state were to adopt a different standard for triggering liability, the uniformity that was intended by Congress when it enacted the BIA would be subverted. *Id.* (quoting *Law*, 114 F.3d at 910-911). Because the plaintiff's state common law tort claim fell into a field of regulation that had been occupied

by the federal government, the Eighth Circuit held that the plaintiff's claim was preempted. 152 F.3d at 880-81.

***Springston v. Consolidated Rail Corp.*:** The Sixth Circuit addressed the preemptive scope of the BIA and found that state common law tort law claims against railroad manufacturers are preempted. *Springston v. Consolidated Rail Corp.*, 130 F.3d 241 (6th Cir.1997). In Springston, the plaintiff brought claims against a railroad and train manufacturer after the vehicle in which he was traveling was struck by a train at a rail crossing. *Id.* at 243. The district court granted summary judgment in favor of the manufacturer, and partial summary judgment in favor of the railroad, ruling the plaintiff's claims that the railroad and manufacturer negligently failed to properly equip the train with visual warning devices were preempted. *Id.*

The Eighth Circuit stated that "[w]here Congress intends to occupy a field, state law in that field is preempted." *Id.* (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 212-13 (1983)). The Eighth Circuit noted that Congress intended to confer the scope of regulating all aspects of locomotive components to the federal government, thereby occupying this field and preempting state control. *Springston*, 130 F.3d at 245. This preemptive effect created by the occupation of this field is extensive and includes state common law tort claims. *Id.*

It is also important to note that despite the Petitioners' claim that all of these cases sprung out of the *Law* decision, [Pet. at 13], *Springston* was argued on the day that the *Law* decision was issued. Moreover, *Springston* does not even mention the *Law* case in its decision. Accordingly, the Sixth and Ninth Courts of Appeal unknowingly and separately reached the same conclusion. The West Virginia courts are in agreement with those decisions.

Because the decisions of the state courts of last resort and the United States Courts of Appeals are unanimous and wholly consistent with the decision of the West Virginia trial court and West Virginia Supreme Court below, the denial of the writ is appropriate.

CONCLUSION

For all of the above-stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JON B. ORNDORFF
Counsel of Record
BAKER & LANCIANESE
1108 Third Avenue, Suite 300
Huntington, WV 25701
(304) 522-6906

Counsel for Respondent,
Old Orchard Industrial Corp.,
Individually and as Successor-
in-Interest to Vapor Corporation